Supreme Court U.S.
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No. 03-506

In The

# Supreme Court of the United States

CHRISTOPHER SPIERER, and MARION SPIERER,

*Petitioners,*

v.

FEDERATED DEPARTMENT STORES, INC., ALLIED STORES CORPORATION, and BLOOMINGDALE'S, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals correctly determine that the Bankruptcy Court had jurisdiction to stay the Petitioners' state court litigation and require Petitioners to participate in non-binding alternative dispute resolution?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Federated Department Stores, Inc. is a publicly held corporation, has no parent corporation, and there is no publicly held company that owns 10% or more of the corporation's stock.

Respondent Allied Stores Corporation was merged into Federated Department Stores, Inc., pursuant to a Plan of Reorganization.

Bloomingdale's, Inc. is a wholly-owned subsidiary of Federated Retail Holdings, Inc. who is in turn a wholly-owned subsidiary of Federated Department Stores, Inc.

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## BRIEF IN OPPOSITION

Respondents Federated Department Stores, Inc., Allied Stores Corporation, and certain of their subsidiaries, including Bloomingdale's, Inc. request that this Court deny the Petition for Writ of Certiorari filed by Petitioners seeking review of the decision of the Sixth Circuit Court of Appeals that affirmed the Bankruptcy Court's jurisdiction to stay Petitioners' state court litigation pending completion of non-binding alternative dispute resolution.

## STATEMENT OF THE CASE

### A. Background.

On January 15, 1990, Federated Department Stores, Inc., Allied Stores Corporation and certain of their subsidiaries, including Bloomingdale's, Inc., each commenced a voluntary case under Chapter 11 of the Bankruptcy Code. (Apx 121).[1] Pursuant to orders of the Bankruptcy Court, the Chapter 11 cases were consolidated for procedural purposes only and were jointly administered. *Id.* On October 28, 1991, the Debtors filed with the Bankruptcy Court their Third Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (the "Plan"). *Id.* On January 10, 1992, the Bankruptcy Court entered its Findings of Fact, Conclusions of Law and Order Confirming the Plan. *Id.* The effective date of the Plan was February 4, 1992 (the "Effective Date"). *Id.* The Plan provided for the creation of Federated, Allied, Bloomingdale's and

[1] "Apx __" refers to the Joint Appendix filed in the Sixth Circuit Court of Appeals.

other Debtors as reorganized Debtors (the "Reorganized Debtors") from and after the Effective Date. *Id.*

**B. Alternative Dispute Resolution and the Petitioners' Claim.**

On December 9, 1996, the Reorganized Debtors filed a Motion for an Order Approving and Authorizing the Implementation of an Alternative Dispute Resolution Procedure for Certain Unresolved Personal Injury Claims and Certain Other Claims (the "ADR Motion") (Apx 406). In the ADR Motion, the Reorganized Debtors stated that thousands of claims had been filed in the bankruptcy cases, and that disposition had been reached with respect to most of them. *Id.* The ADR Motion was directed at the few remaining claims that as of the date of filing of the ADR Motion remained unresolved. *Id.* The claim of Marion & Christopher Spierer (the "Spierers" or "Petitioners") was listed as being unresolved. *Id.* Petitioners had filed a proof of claim in 1990 based on allegations that they were injured by exposure to toxic chemicals contained in a mattress manufactured by Simmons USA and supplied to them by Reorganized Debtors prior to the Petition Date. Notice of the ADR Motion was given to the Spierers and others whose claims had not been resolved. (May 18, 2001 Decision, Apx 406).

On January 9, 1997, the Bankruptcy Court entered its Order authorizing and approving an alternative dispute resolution procedure (the "ADR Procedure") for certain unresolved personal injury claims and certain other claims (the "1997 ADR Order") including the Spierers' claim. (ADR Order, Apx 189). The 1997 ADR Order required that the listed claimants submit their claims pursuant to the

ADR Procedures. *Id.* The ADR Procedures required each Disputed Claim (as defined in the 1997 ADR Order) to undergo a three step process including (also as defined in the 1997 ADR Order): 1) Offer Exchange Procedure; 2) Mediation Procedure; and 3) arbitration proceedings. (*Id.* at ¶¶ 4-10, Apx 191-92). The 1997 ADR Order directs that only upon completion of the arbitration proceedings may a party to a Disputed Claim serve a notice of intent to litigate the Disputed Claim before an appropriate court. (*Id.* at ¶ 13, Apx 193). The Order also included an injunction pursuant to §§ 105, 524 and 1141 of the Bankruptcy Code, which prohibited any other proceeding then pending in a forum other than the Bankruptcy Court. *Id.*

### C. Petitioners' Attempts to Avoid Alternative Dispute Resolution.

On August 6, 1999, the Spierers brought a motion (the "Marber Motion") in the form of an Affidavit of Paul A. Marber, their former attorney. (R. 1, Declaration of Debtors' Counsel, Exhibit D, Apx 233). The Marber Motion requested an order (1) directing that the ADR proceed in Boca Raton, Florida; (2) permitting the Spierers to file a Notice of Intention to Litigate and proceed with litigation in the New York Supreme Court in lieu of proceeding with the ADR Procedures; and (3) requiring that certain insurance information be furnished to claimants. *Id.*

With respect to the first request, the Spierers have claimed from at least November 1998, just one week prior to the original arbitration hearing in this matter, that they are unable to travel to New York City for the mandatory

arbitration hearing due to their failing health.[2] (*Id.* at ¶¶ 6-7, Apx 239). Counsel for the Spierers described their medical limitations as follows:

> It is apparent from the reports prepared by the Spierers' doctors that they are highly susceptible to sever allergic reactions and, therefore, must remain in controlled environments. As a result, their ability to travel is greatly curtailed since exposure to chemicals common in public settings are detrimental to their health.

(*Id.* at ¶ 10, Apx 242). The Spierers therefore requested that the arbitration proceeding be held in an "environmentally safe location" in Boca Raton, Florida, in the proximity of their home. *Id.*

The Spierers' refusal to attend arbitration in New York City, as directed in the ADR Order (Bankruptcy Court's Order dated September 22, 1999, at page 2, Apx 325) and numerous requests to the arbitrator to hold the arbitration hearing in Florida caused more than a two year delay in resolving the Spierers' claim. Letters exchanged between counsel for the Spierers, Simmons Company, Reorganized Debtors and the American Arbitration Association ("AAA") demonstrate the tortured route the Spierers' personal injury case has taken. (Exhibits F through J to Debtors' Counsel's Declaration, Apx 316-52).

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[2] It should be noted that the Spierers' refusal to attend an arbitration hearing in New York *predates* the Marber Motion in which the Spierers requested that their case be allowed to proceed in the New York State Supreme Court.

In a letter dated June 10, 1999, attached to the Debtors' Counsel's Declaration as Exhibit F, the Spierers' former counsel informed AAA that his clients had located an "environmentally safe location" in Boca Raton, Florida, at which the arbitration proceedings could take place. (*Id.*, Apx 316). The Spierers placed the condition on use of the premises that "those participating in the arbitration refrain from wearing any cologne, perfume, scented body soaps, hair spray or any other scented products prior to and during the proceeding." *Id.* In response, counsel for the Simmons Company, participating in the arbitration pursuant to the ADR Order, objected via a letter dated June 16, 1999, on the grounds that the Spierers refused to identify the environmentally safe location and that the convenience of the Spierers did not warrant causing all other parties to the arbitration to travel to Florida for the arbitration hearing. (*Id.* at Exhibit G, Apx 318).

On September 22, 1999, the Bankruptcy Court entered its Order upon the Marber Motion (the "Marber Order") (Apx 325). It denied relief to the Spierers with respect to their request that the Bankruptcy Court direct the location of the ADR Procedure stating that the location was under the authority of the Arbitrator. *Id.* It denied as well the request that the Spierers be allowed to file a notice of intention to litigate without completing the procedure set out in the ADR Order. *Id.* The Bankruptcy Court held that as "to the claimants' second ground for relief, that they be allowed to file a notice of intention to litigate, that likewise is denied. *Id.* The ADR Procedures do provide for the filing of such a notice, but a predicate is required. That predicate is that arbitration occur first." *Id.* It also denied the request for discovery as that was in the province of the Arbitrator. *Id.*

Not satisfied with the Bankruptcy Court's direction in the Marber Order, the Spierers continued on their bizarre quest of avoiding arbitration in New York City. (Letter dated January 7, 2000, attached to the Declaration as Exhibit H, written by counsel for the Simmons Company as an objection to yet another request to AAA by the Spierers that they not be compelled to participate in arbitration proceedings in New York City, Apx 320). The January 7, 2000, correspondence provides a summary of the long and tortured procedural history of the Spierers' claim. It also indicates the Spierers' relentless campaign to thwart the efforts of the Bankruptcy Court and the Arbitrator to settle the Spierers' underlying personal injury case.

Counsel for the Spierers ultimately requested and was allowed to withdraw as their counsel by a New York state court. New counsel, Ian Anderson, filed a notice of appearance in the New York state court.

On February 3, 2000, the Arbitrator relented by ordering that the arbitration hearing be held in New York City but that the Spierers could attend from Florida via videoconferencing. (AAA letter dated February 3, 2000 attached as Exhibit I to the Declaration, Apx 348). Not satisfied with this compromise, the Spierers objected to the Arbitrator's decision causing additional correspondence from the Simmons Company. (Letter of counsel for Simmons Company dated February 17, 2000, attached to the Declaration as Exhibit J, Apx 350).

### D. Petitioners' Motion to Lift the Stay.

This matter came before the Bankruptcy Court again on January 18, 2001, when Reorganized Debtors filed their

Fifth Motion for Order Authorizing Withdrawal of Available Excess Funding from Disputed Claims Reserve. (Apx 121). The Spierers objected to the motion on February 16, 2001. (Cross-Motion, Apx 132). Apparently undeterred by the Marber Order and the Arbitrators' decision, the Spierers also included with their objection a Cross-Motion seeking to lift the automatic stay so that their personal injury claim could proceed in New York exempt from the ADR Procedures:

> The Court ordered non-binding alternative dispute resolution cannot proceed due to the excessive costs involved in such proceedings. Due to the fact that numerous expert scientific and medical witnesses necessary for such proceedings come from different parts of the country, the Arbitrator has, on information and belief, requested that the proceedings be conducted by video link. Movants, who are in receipt of disability payments, are unable to meet their portion of the costs of this process. As such the arbitration has been unable to proceed. Due to the complex scientific and medical issues involved in movants [sic] State claims, resolution by the State Court, will be both more efficient and less costly than the present non-binding alternative dispute resolution.

(*See Id.* at ¶ 8(c), Apx 136).

Reorganized Debtors objected to the Cross-Motion, first on grounds that denial of the Spierers' request for affirmative relief was required by the theory of the law of the case. (Response to Cross-Motion, Apx 150). The Marber Order specifically held that the Spierers had to complete the ADR Procedures before they could litigate. In addition, the Reorganized Debtors objected because any delays

claimed by the Spierers in the ADR Procedures were of the Spierers' own making.

A hearing was held first on February 27, 2001, and was continued to March 13, 2001. The Bankruptcy Court, by Order of May 18, 2001, overruled the Spierers' objection and granted Reorganized Debtors' motion to withdraw funds. (The "May 18, 2001 Decision", Apx 406). The Spierers do not appeal from this portion of the Bankruptcy Court's Order.

In the same Order, the Bankruptcy Court also overruled the Spierers' Motion to Lift the Stay. *Id.* The Bankruptcy Court reiterated that the purpose of the ADR Order was a means for expediting the resolution of a relatively few remaining claims. *Id.* The Court also noted that the Spierers had the opportunity to object to the ADR Procedures and having failed to do so were "bound by that order." (*Id.* at p. 6, Apx 411). The Court ultimately held that "[t]here is nothing in the motion presented by the Spierers which warrants the relief they seek, that at this time, four years after the entry authorizing ADR procedures, that they be excepted from the operation of that order." (*Id.* at p. 7, Apx 412).[3]

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[3] On June 25, 2001, the Bankruptcy Court entered a Final Decree under section 350(a) of the Bankruptcy Code closing the Federated, Allied and Bloomingdale's chapter 11 cases. Pursuant to the Final Decree, the Bankruptcy Court retained jurisdiction over any issues related to the Spierer Appeal.

**E. The District Court Proceedings.**

The Spierers appealed to the District Court for the Southern District of Ohio on May 29, 2001. After briefing, District Court Judge Sandra S. Beckwith, in a written decision, dismissed the appeal on October 31, 2001. (Judgment in a Civil Case, Apx 522). Specifically, the District Court held "[e]ach of the issues raised by the Spierers on appeal was ripe for resolution as of January 8, 1997. The Spierers did not, however, challenge the Order issued by the Bankruptcy Court on that date. Moreover, they did not move for relief from the stay imposed by that Order on any of the grounds now asserted for reversal of the Bankruptcy Court's May 18 [sic], 2001, Order." (Opinion at p. 3-4, Apx. 520). The Court explained that in this appeal, "the Spierers challenge none of the factual findings or legal conclusions set forth in the order from which the appeal is taken. In short, their present appeal is from the January 8, 1997, order of the Bankruptcy Court and not the May 18 [sic], 2001 order."

**F. The Sixth Circuit Court of Appeals.**

The Spierers then appealed to the Sixth Circuit Court of Appeals. The Court of Appeals recognized that the jurisdictional challenge to the January 8, 1997 Order imposing the stay and requiring the parties to go to ADR before litigating was a constitutional question. Addressing the issue, the Court held that the power to stay other pending litigation involving the debtors' estate was within the Bankruptcy Court's constitutional jurisdiction. Having dismissed the jurisdictional challenge, the Court held that the Bankruptcy Judge's decision to refuse to lift the stay was well within the Bankruptcy Court's discretion. Consequently the Court affirmed the decision of the

Bankruptcy Court. A request for consideration *en banc* was denied.

Petitioners now request that this Honorable Court consider this matter as well. The Petition for Writ of Certiorari should be denied.

## REASONS SUPPORTING DENIAL OF THE PETITION

### A. The Bankruptcy Court Has Authority to Refer Cases to Alternative Dispute Resolution.

The Spierers challenge the Bankruptcy Court's general authority to refer matters to ADR. They are simply wrong as there is ample support, both statutory and case law, underlying the Bankruptcy Court's decision to refer this matter to ADR.

*First*, there is the Alternative Dispute Resolution Act of 1998 ("ADR Act"). The ADR Act defines alternative dispute resolution as "any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration." 28 U.S.C. § 651(a). The ADR Act requires that each United States district court "authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy" and further requires that each district court "devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." *Id.* § 651(b).

Even without the express reference to "adversary proceedings in bankruptcy," the ADR Act arguably applies to bankruptcy courts, just as it does to district courts, because bankruptcy courts are units of the district courts. *See* 28 U.S.C. § 151 (1993).

*Second*, Rule 16 of the Federal Rules of Civil Procedure also provides authority for referral to ADR. It authorizes a court to "take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." Fed. R. Civ. P. 16. Disputes in bankruptcy are either contested matters governed by Fed. R. Bankr. P. 9014, or are adversary proceedings, governed by the Federal Rules of Civil Procedure, found in Part VII of the Bankruptcy Rules (7001 through 7087). For adversary proceedings, Bankruptcy Rule 7016 specifically makes Rule 16 applicable. For contested matters, Bankruptcy Rule 9014 allows the court to "direct that one or more of the other rules in Part VII shall apply." Thus, Fed. R. Civ. P. 16 provides authority for bankruptcy courts to require the parties to use ADR, in both adversary proceedings and contested matters.

*Third*, section 1123 of the Bankruptcy Code likewise provides support for the Bankruptcy Court's 1997 ADR Order. Subsections 1123(a)(3) and (4) require a plan of reorganization to specify and provide for the treatment of each classified claim. 11 U.S.C. § 1123(a)(3), (4). Subsection 1123(b)(6) allows the plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). Under this authority, at least where the affected class has accepted the plan, bankruptcy courts have confirmed plans of reorganization which provide for the liquidation of claims

through ADR-driven claims resolution facilities. *See e.g.*, *In re A.H. Robins,* 88 B.R. 742 (E.D. Va.), *aff'd*, 880 F.2d 694 (4th Cir. 1988), *cert. denied*, 493 U.S. 959 (1989). Indeed, a class of claims may submit itself and its dissenters to mandatory, nonbinding ADR under a confirmed plan. 11 U.S.C. § 1123(b)(6); *In re A.H. Robins Co.*, 880 F.2d at 698 (94% of tort claimants voted to accept the plan and its nonbinding ADR Procedures for the resolution of claims); *In re Drexel Burnham & Lambert Group, Inc.*, 130 B.R. 910, 920 (S.D.N.Y. 1991) (settlement establishes the legal, equitable, and contractual rights of all class members regarding the debtors' liability; provided the plan gives the class precisely the consideration the settlement establishes to be the collective rights of the class, the class is unimpaired).

*Fourth*, the inherent authority of federal courts, including bankruptcy courts, permits them to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. The doctrine of "inherent authority" was introduced into American jurisprudence in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). The Supreme Court acknowledged its continued validity in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962). *See Ex parte Peterson*, 253 U.S. 300, 312 (1920) (federal courts enjoy the "inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

Finally and more importantly, section 105 of the Bankruptcy Code, as the Sixth Circuit expressly held, authority for a bankruptcy court to establish an ADR system to resolve disputes. 11 U.S.C. § 105. It empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the

provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a); *see Erti v. PaineWebber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 348 (2d Cir. 1985) ("(T)he Bankruptcy Court . . . may use its equitable powers to assure the orderly conduct of the reorganization proceedings"). Section 105(d) of the Bankruptcy Code, provides statutory support for the use of mandatory, nonbinding ADR Procedures in bankruptcy cases:

> The court, on its own motion or on the request of a party in interest, may –
>
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically. . . .

11 U.S.C. § 105(d). The statute also provides a nonexclusive list of orders that may be entered by the court to expedite the case, such as setting a date by which a debtor shall file a plan of reorganization and disclosure statement. The legislative history indicates that this amendment "authorizes bankruptcy court judges to . . . manage their dockets in a more efficient and expeditious manner." H.R. 5116, 103d Cong., 2d Sess., 140 Cong. Rec. 10752, 10764 (1994). The statute gives bankruptcy judges considerable latitude to compel parties to submit their dispute to ADR prior to trial as a means of expeditiously and economically handling the case.

The Sixth Circuit correctly found that the Bankruptcy Court's exercise of that power was within the confines of Article III. U.S. Cons. Art. III, § 1. First, "Granting the bankruptcy court this ability to stay state court proceeding in no way aggrandizes Congress's power with respect to the judiciary." Second, the power exercised by the Court does not resolve the state court litigation but only affects the "timing" of the litigation. Finally, the restrictions imposed are minimal and for important and legitimate reasons.

### B. There Is No Conflict Among The Circuits

Petitioners assert that there is a conflict with the Sixth Circuit's decision in the case at bar and the other Courts of Appeals. Petitioners do not, however, cite to any cases where a court was faced with the same issues involved here and that court reached the opposite conclusion. Simply put, there is no conflict.

Petitioners instead try to argue that the Sixth Circuit's "general" interpretation of 11 U.S.C. §105 is broader that the other circuits' interpretation. Such a difference, even if true, would not create an issue worthy of this Court's review.

### C. The Bankruptcy Court Was Correct in Denying the Spierers' Motion To Lift the Stay and Did Not Abuse its Discretion.

The Bankruptcy Court did not abuse its discretion in requiring the Spierers to follow through with the ADR process. The Bankruptcy Court, after reviewing the pleadings, simply came to the conclusion that nothing in the

Spierers' motion entitled them to avoid the ADR Procedures. As the Sixth Circuit noted, this decision was well within the Bankruptcy Court's discretion.

## CONCLUSION

The Bankruptcy Court did not abuse its discretion in requiring Petitioners to try to resolve their personal injury claims through non-binding alternative dispute resolution. Petitioners' state law claims have been pending since the mid-1980s and should hopefully benefit from the process. It is also evident from the myriad of statutory and other legal support, that the Bankruptcy Court had the necessary authority to require Petitioners to participate in ADR. Because the Bankruptcy Court's actions only briefly delayed the state court case, Petitioners' argument that the Court exceeded its constitutional powers fails. For the foregoing reasons, Respondents respectfully request that the Petitioners' writ of certiorari be denied.

Dated: November 5, 2003

Respectfully submitted,

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